Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

Def 28

PETITIONERS' RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

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ARGUMENT

I

CIVIL RIGHTS ATTORNEY'S FEE AWARD ACT OF 1976.

A.

THERE HAVE BEEN NO FOURTEENTH AMENDMENT RIGHTS RAISED IN THIS CASE.

On June 1, 1976, this Court granted a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to decide the following question:

> Whether the Eleventh Amendment to the Constitution of the United States is an absolute bar to an award of attorney fees against officials of the State of Indiana when such an award is made against them in their official capacities.

After briefing by the parties, the Respondents filed their Supplemental Brief advising this Court of the passage by Congress of "The Civil Rights Attorney's Fees Awards Act of 1976" (hereafter the Act), which was signed into law by President Ford on October 19, 1976. Respondents contend that that statute is another reason why the opinions of the lower courts should be affirmed. Petitioners will show that the new act is not applicable to this case, and therefore, that the original question to be reviewed by this Court is still viable. The original position of the State is actually strengthened by the passage of the Act since it is an acknowledgement by Congress that there is no statutory authority for an award of attorney fees in §1983 litigation.

In Fitzpatrick v. Bitzer, 96 S Ct.2666 (1976) this Court held:

> . . we think that the Eleventh Amendment, and the principles of state sovereignty which it embodies, see Hans v Louisiana, 134 U.S. 1 (1890) are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See Edelman v Jordan, supra; Ford Motor Co. v Department of Treasury, supra (Emphasis supplied)

In affirming the award of attorney fees in Bitzer this Court did not grant blanket approval of all awards of attorney fees against States, but held only that such an award may be permissible when Congress legislates pursuant to §5 of the Fourteenth Amendment.

There has never been a Fourteenth Amendment issue raised in this case, nor were the decisions of the District Court and the Seventh Circuit based upon that Amendment. The original action was brought for a claim under 42 U.S.C. §1983 pursuant to 28 U.S.C. §§1343(3) and (4), for a claim pursuant to 28 U.S.C. §1331, and for declaratory relief pursuant to 28 U.S.C. §§2201 and 2202. Specifically, the allegations were that the State had not complied with provisions of the Social Security Act, 42 U.S.C. §1396d(a)(4)(B) and regulations promulgated thereunder in implementing a medicaid screening program.

While 42 U.S.C. §1983 is one of the statutes purportedly covered by the Act, it is important to realize that §1983 encompasses both constitutional and statutory rights. King v Smith 392 U.S. 309 (1968); Townsend v. Swank 404 U.S. 283 (1971). This case involves only statutory rights under §1983, and the only constitutional issues that could be involved would arise under the General Welfare Clause, Article 1, §8 of the Constitution of the United States. Helvering v. Davis, 301 U.S. 619 (1937).

Thus, since this is not a Fourteenth Amendment case, the Act is not applicable and the only issue involved is whether the Eleventh Amendment bars the award of attorney fees against State officials in their official capacities.

B.

THE DEFINITION OF "PERSON" UNDER 42 U.S.C. §1983 HAS NOT BEEN AMENDED TO INCLUDE STATES.

Although the State does not believe that the Act is applicable here, or that it should even be discussed since there has been no opportunity for the lower courts to rule on the statute after full briefing by the parties, the State would, nevertheless, make several additional comments on the Act.

The statute does not specifically include states pursuant to Fitzpatrick v. Bitzer, supra, and therefore, does not

act to permit fees in this case. In Bitzer the award of fees was made pursuant to an express statutory provision 42 U.S.C. §2000e-5(k), part of the statute that originally permitted the lawsuit. That section provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and United States shall be liable for costs the same as a private person.

That statute however, must be read in conjunction with another section of Title VII, 42 U.S.C. §2000e(a) which provides that the definition of "person" includes "governments, governmental agencies [and] political subdivisions."

Of critical importance here is the fact that the Act does not amend the definition of "person" found in 42 U.S.C. §1983 to cover states. It is well settled that states are not "persons" under §1983, Monroe v. Pape, 365 U.S. 167 (1961); City of Kenosha v. Bruno, 412 U.S. 507 (1973); Clark v. Washington, 366 F. 2d 678 (9th Cir., 1966); Jaso v. Tracszyk, 367 F. Supp. 434 (N.D. Ind., 1973), and therefore, are not subject to suit and an award of attorney fees pursuant to that statute. Thus, an attempt to pass a general amendatory statute to cover states in contravention of a Constitutional right, must fail.

C.

CONGRESS CANNOT AMEND THE CONSTITUTION BY STATUTE

By trying to make this Act apply to the case at bar, Respondents are actually saying that Congress can destroy a Constitutional provision by the enactment of any statute even when that statute does not have a constitutional provision as its basis. The State would emphatically assert that this position is untenable, and that the only way the Constitution may be altered is by amendment.

In Employees of the Department of Public Health and Welfare v. Missouri, 411 U.S. 279 (1973), this Court held that the Fair Labor Standards Act did not supersede the sovereign immunity of the State, holding at page 284:

> "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."

Thus, it is equally true that the enactment of the Social Security Act pursuant to the "general welfare" clause of the Constitution, Art. 1, §8 would be on the same footing and cannot operate as a deprivation of the Eleventh Amendment defense granted to the states.

Even though the legislative history purports to have the Act apply retroactively this Court need not reach that question since the Act does not apply.

CONCLUSION

For these reasons, the Petitioners would assert that "The Civil Rights Attorney's Fees Awards Act of 1976" is not applicable to the issue before this Court, and therefore, the award of attorney fees against State officials in their official capacities must be reversed.

Respectfully submitted,

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